BRIEF FOR RESPONDENTS IN OPPOSITION

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. 75-1482

GEISHA HOUSE, INC.,
Petitioner,
v.
MAURICE J. CULLINANE, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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JOHN R. RISHER, JR.,
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation Counsel, D.C.

RICHARD W. BARTON,
Assistant Corporation Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation Counsel, D.C.

Attorneys for Respondents,
District Building,
Washington, D.C. 20004
Telephone: 629-3916

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QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly concluded, on the basis of decisions of this Court, that petitioner's constitutional challenges to D.C. Code, 1973, § 47-2311, which prohibits a person from administering a bath or massage to a member of the opposite sex in a licensed massage establishment, are totally insubstantial.

STATUTE INVOLVED

D.C. Code, 1973 Edition:

> "§ 47-2311. *Massage establishments—Turkish, Russian, or medicated baths.*
>
> "* * * It shall be unlawful for any female to give or administer massage treatment or any bath to any person of the male sex, or for any person of the male sex to give or administer massage treatment or any bath to any person of the female sex, in any establishment licensed under this section. Any person violating the provisions of this section shall, upon conviction, be punished as hereinafter provided in this chapter * * *."

COUNTER-STATEMENT OF THE CASE

Petitioner is a corporation licensed to engage in business as a massage establishment in the District of Columbia. Respondents are the Metropolitan Police Chief and an inspector in charge of the Metropolitan Police Department's Morals Division.

In an action for declaratory and injunctive relief filed in the District of Columbia Superior Court, petitioner challenged the constitutionality of D.C. Code, 1973, § 47-2311, which makes it unlawful for a person to administer a massage or bath to a person of the opposite sex in any licensed massage establishment in the District of Columbia (Pet. App. 1a-2a, 28a-29a). Following the entry by the Superior Court of an order granting petitioner's motion for a preliminary injunction (Pet. App. 2a), the case came on before the court on petitioner's request for permanent injunctive relief. Following a hearing, the court declared § 47-2311 unconstitutional and permanently enjoined respondents from enforcing it (Pet. App. 2a, 27a). The court filed an opinion in support of its ruling (Pet. App. 1a-27a). The District of Columbia Court of Appeals reversed (Pet. App. 28a-32a), and this petition for a writ of certiorari followed.

REASONS FOR DENYING THE WRIT

In reversing the judgment of the District of Columbia Superior Court, the District of Columbia Court of Appeals concluded that petitioner's constitutional challenges to D.C. Code, 1973, § 47-2311, were insubstantial. In taking such an approach, the Court relied on recent decisions of this Court summarily disposing of appeals in cases in which similar constitutional challenges had been advanced. *Kisley* v. *City of Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972), appeal dismissed for want of substantial federal question, 409 U.S. 907 (1972); *Rubenstein* v. *Township of Cherryhill*, No. M-236 (N.J., 1974), appeal dismissed for want of substantial federal question, 417 U.S. 963 (1974); *Smith* v. *Keator*, 285 N.C. 530, 206 S.E.2d 203 (1974), appeal dismissed for want of substantial federal question, 419 U.S. 1043 (1974).

As recently as last term, this Court held that a summary disposition by it of an appeal, whether by affirmance or dismissal for want of a substantial federal question, is a decision on the merits and, as such, binding on lower courts to the extent that similar questions are presented. *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975). Although petitioner suggests that this Court should exercise its certiorari jurisdiction in order to reexamine such a holding, petitioner advances no logical reason why this Court should do so. In questioning the significance of this Court's pronouncements in *Hicks* as to the effect of its summary disposition of an appeal, petitioner (petition at 11) essentially relies on authorities which antedated that decision. And although there was a dissenting opinion in *Hicks*, not one member of this Court took issue with that part of the majority opinion which addressed the meaning of a dismissal for want of a substantial federal question. Cf. *Colorado Springs Amusements, Ltd.* v. *Rizzo*, 524 F.2d 571, 575, n. 8 (3rd Cir., 1975).

Petitioner cites no recent doctrinal developments which would support the thesis that any of the constitutional issues tendered to this Court in *Kisley*, *Rubenstein* and *Smith*, and similarly tendered to the District of Columbia Court of Appeals in this case, have suddenly become so substantial as to warrant this Court's plenary consideration. Cf. *Colorado Springs Amusements, Ltd.* v. *Rizzo*, *supra*, 524 F.2d at 576-577; *Hogge* v. *Johnson*, 526 F.2d 833 at 835 (4th Cir., 1975). However, in an attempt to avoid the impact of this Court's summary disposition pattern in appeals involving similar constitutional challenges by operators of massage parlors, petitioner asserts (petition at 8) that the statute in this case has a unique feature which distinguishes it from those involved in the decisions of this Court upon which the District of Columbia Court of Appeals relied. In that regard, petitioner points to the absence in its antecedent legislative history of both documentation of a congressional response to mischief in the form of illicit conduct in massage parlors and a legislative purpose designed to promote the public interests of order and morality. It is clear, however, that petitioner has misconceived the applicable legal standards enunciated by this Court. As this Court made plain in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), when, as here, fundamental rights and suspect classifications are not involved, the statute must be upheld if "'* * * any state of facts reasonably may be conceived to justify it' * * *." Under the rational relationship test, "courts have attributed to the legislature any reasonably conceivable purpose which would support the constitutionality of the classification." See *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065 at 1078 (1969). And it is "constitutionally irrelevant whether * * * [the] reasoning [sustaining the statute] in fact underlay the legislative decision * * *." *Flemming* v. *Nestor*, 363 U.S. 603, 612 (1960). Therefore, as the Superior Court in effect recognized (Pet. App. 16a), all reasonable legislative purposes should be

explored in passing on the validity of the provision involved. Applying these principles here, it requires little imagination to discern from the face of § 47-2311, D.C. Code, 1973, that it is designed to curtail opportunities for licentiousness and promiscuity that would otherwise exist in the intimacy of the treatment room of a massage parlor (cf. Pet. App. 28a, n. 1). As such, it obviously promotes the public interests of order and morality. Since that is a valid legislative purpose, and one which underpinned the similar enactments recently upheld by this Court under the raional relationship test, petitioner's contention that the local statute is *sui generis*, for purposes of judicial scrutiny under the equal protection doctrine, is plainly insufficient to warrant the exercise of this Court's certiorari jurisdiction.

Petitioner additionally contends that this case presents an issue not tendered to this Court in appeals from decisions upholding the constitutionality of other enactments prohibiting the practice of cross-sexual massage, i.e., whether § 47-2311 results in a denial of equal protection of the law because of its failure to regulate such a practice in places other than in licensed establishments (petition at 9).[1] In *Kisley* v. *City of Falls Church*, *supra*, however, the petitioner claimed (Jurisdictional Statement at 7) that the ordinance involved resulted in a denial of equal protection because it distinguished between massage as performed in its establishment and massage as performed in barber shops and beauty parlors. In responding to that contention (Motion to Dismiss or Affirm at 4-5), the City urged that there was a rational basis

[1] Petitioner in effect concedes that the various other constitutional issues passed on by the District of Columbia Court of Appeals (Pet. App. 30a) were also presented in appeals summarily disposed of by this Court on prior occasions, for petitioner makes no contention to the contrary. In any event, such a contention would be baseless. See *Colorado Springs Amusements, Ltd.* v. *Rizzo*, *supra*, 524 F.2d at 576.

for such a distinction because of the advertising techniques utilized and the types of services performed in establishments such as that involved. (See also 187 S.E.2d at 170.) Advertising material which depicts the distinct nature of the services performed in petitioner's establishment is contained in the record in this case and was specifically noted (Pet. App. 28a at n. 1) by the District of Columbia Court of Appeals. In any event, the insubstantiality of the contention that § 47-2311 unconstitutionally discriminates against the practice of massage as performed in licensed establishments because of its failure to address the practice as performed elsewhere is readily apparent from an unbroken line of this Court's decisions which hold that in approaching a problem, a legislative body may confine its prohibition to cases in which the regulatory need appears to be clearest and does not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. See *Heath & Milligan Co.* v. *Worst*, 207 U.S. 338, 354-355 (1907); *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157, 160-161 (1912); *Keokee Coke Co.* v. *Taylor*, 234 U.S. 224, 227 (1914); *West Coast Hotel* v. *Parrish*, 300 U.S. 379, 400 (1937); *Williamson* v. *Lee Optical*, 348 U.S. 483, 489 (1955); *McDonald* v. *Board of Election*, 394 U.S. 802, 809 (1969); *Geduldig* v. *Aiello*, 417 U.S. 484, 495 (1974). "[There] is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency* v. *New York*, 336 U.S. 106, 110 (1949).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN R. RISHER, JR.,
Corporation Counsel, D.C.

LOUIS P. ROBBINS,
Principal Assistant Corporation
Counsel, D.C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D.C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D.C.
Attorneys for Respondents,
District Building,
Washington, D.C. 20004
Telephone: 629-3916